No. 6462

In the United States Circuit Court of Appeals

For the Ninth Circuit

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and THOMAS WINKLER,

Appellants,

vs.

ANDREW F. MAHONY COMPANY, a Corporation, and FIDELITY-PHOENIX FIRE INSURANCE COMPANY, a Corporation,

Appellees.

Brief of Appellant Thomas Winkler

Upon Appeal From the United States District Court
For the Western District of Washington
Northern Division

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INDEX

	Page
Argument	8-39
Specification of Errors	7
Statement of Case	2-7

TABLE OF CASES

Anaconda Div. No. 1, A. O. H. vs. Sparrow, 29 Mont. 132, 74 Pac. 197	26
Andrejwski vs. Wolverine Coal Co. (Mich.) 148 N. W. 684, 182 Mich. 298	28-30-32
Aldridge vs. Williams, 44 U. S. 3 How. 9-24	34
Andrew F. Mahony Company et al, vs. Marshall, etc. and Winkler, 46 Fed. (2nd) 539	7
Baltimore, etc. S. S. Co. vs. Norton, 40 Fed. (2nd) 271	23
Bliss vs. Tyler, et al, 149 Mich. 601, 113 N. W. 317	26
Belliamo vs. Marlin-Rockwell Corp. 213 N. Y. S. 85	33
Comm. vs. Owensboro, etc. R. Co. 95 Ky. 60, 23 S. W. 868	36
Cooley Constitutional Limitations, 5th ed. 69	37
Deverso vs. Parsons, 225 N. Y. S. 78	32
Deeming vs. McClaughry, 113 Fed. 639. Affirmed 186 U. S. 49, 46 L. ed. 1049	36
Ewing vs. Ainger, 97 Mich. 381, 56 N. W. 967	37
Gunther Minnie vs. United States Employees Compensation Commission, 41 Fed. (2nd) 151	2-5

Page

Geroux vs. McClintic-Marshall, 233 N. Y. S. 402 16-32

Gruber vs. Kramer Amusement Co. 207 App. Div. 564, 202 N. Y. S. 413 28

Houghton vs. Payne, 194 U. S. 88, 48 L. ed. 888 37

Hord vs. State, 167 Ind. 622, 79 N. E. 916 36

Iselin vs. U. S. 270 U. S. 245, 70 L. ed. 566 37

Jameson vs. Burton, 43 Iowa 282 26

Kittle vs. Town of Kindehook, 212 N. Y. S. 410 33

Kapler vs. Camp Taghconic, Inc., 213 N. Y. S. 160, 215 App. Div. 51 28

Littler vs. Geo. A. Fuller Co., 223 N. Y. 369, 119 N. E. 554 27-28-29

McCahan Sugar Refining & Molasses Company vs. Augustus P. Norton, 34 Fed. (2nd) 499 9

Morgan vs. State, 51 Neb. 672, 71 N. W. 788 26-27

Mehaffey vs. Ind. Acc. Com. 176 Calif. 711, 171 Pac. 298 28-30-32

McDonald vs. Burden Iron Co. 201 N. Y. S. 720 33

Mitchell vs. Great Works Milling & Mfg. Co. 2 Story, 648, 653 34

Merritt vs. Cameron, 137 U. S. 542, 34 L. ed. 772 37

Northwestern Stevedore Company vs. Marshall, etc. and Matheson, 41 Fed. (2nd) 28 8

Obrecht-Lynch Corporation vs. L. D. Clark, 30 Fed. (2nd) 144 8

Olson vs. Wilson, 20 Mont. 544, 52 Pac. 372 26

Page

Orchard vs. Alexander, 157 U. S. 372, 39 L. ed. 737 37

Patrick J. Joyce vs. United States Deputy Commissioner, 33 Fed. (2nd) 218 8

Pocahontas Fuel Co. vs. Monahan, 34 Fed. (2nd) 549. Affirmed 41 Fed. (2nd) 48 8-27

Perry vs. Wright, 1 K. B. 441 24

Pratt vs. Miller, 109 Mo. 78, 18 S. W. 965 26

Prentice vs. N. Y. State Railways, 181, App. Div. 144, 168 N. Y. S. 55 28

People vs. Consolidated Tel. etc. 187 N. Y. 58, 79 N. E. 892 37

Remo vs. Skenandoa Cotton Co., 189 App. Div. 367, 179 N. Y. S. 46 28-28-29

Reg. vs. Hertford College, L. R. 3 Q. B. Div. 693 34

Ruling Case Law, Vol. 25, Sec. 217, 218, 270 "Statutes" 20-35

State vs. Mortensen, 26 Utah 312, 73 Pac. 562 27

State Road Comm. vs. Ind. Comm. (Utah) 190 Pac. 544 32

Studebaker vs. Perry, 184, U. S. 258, 46 L. ed. 528 36

State vs. Globe Casket Co. 82 Wash. 124, 143 Pac. 878 37

Testo vs. Burden Iron Co. 207 N. Y. S. 454 33

Utah Fuel Co. vs. Ind. Comm. 59 Utah 46, 201 Pac. 1034 28-31-33

Unitah Power & Light Co. vs. Ind. Comm. 189 Pac. 875 32

Page

United States vs. Trans-Missouri Freight Association, 166 U. S. 290, 41 L. ed. 1007. Page 1020 34

United States vs. Union P. R. Co. 91 U. S. 72 34

U. S. vs. Johnson, 173 U. S. 363, 43 L. ed. 731 37

Wheeling Corrugating Co. vs. McManigal, 41 Fed. (2nd) 593 8-19

Whittemore vs. People, 227 Ill. 453, 81 N. E. 427 36

Zurich Gen. Etc. vs. Marshall, 42 Fed. (2nd) 1010 30-34

Longshoremen's and Harbor Workers' Compensation Act. 33 U. S. C. A. 901-50.... 2

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Brief of Appellant Thomas Winkler

Upon Appeal From the United States District Court
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STATEMENT OF THE CASE

This is an appeal from a judgment in the District Court, Western District of Washington, Northern

Division, enjoining an award of the Deputy Commissioner of the Foutrteenth District, under the Act of Congress, March 4th, 1928, known as the Longshoremen's and Harbor Workers' Compensation Act. (Tr. 15.)

It involves the construction of the Acts (Title 33, U. S. C. A. 910) concerning the method of arriving at the average annual earnings of the Appellant Thomas Winkler, for the purpose of computing compensation. Specifically stated, the question involved is whether or not subdivision (b) of Section 910, which was applied by the Deputy Commissioner on the authority of, and pursuant to the decision of this Court in the case of *Minnie Gunther vs. United States Employees Compensation Commission*, 41 Fed. (2nd) 151, applies, or subdivision (c) as contended by complainants, should apply.

The following is disclosed by the record made before the Deputy Commissioner at the hearing held to determine the extent of his injury and his rate of compensation. At this hearing the claimant was not represented. Testimony was introduced, the original certified transcript of which has been transmitted to this Court and is a part of this record.

The claimant therein, now Appellant, Thomas Winkler suffered an injury while in the employ of the Andrew F. Mahony Company while working as a longshoreman at Seattle, Washington, in the hold of the steamship "Jane Nettleton." He was paid com-

pensation by the employer at the rate of $16.23 per week. It was agreed at the hearing before the Deputy Commissioner that Winkler worked during the year preceding his injury, 182 days, or parts of days. (Testimony 2.) It was further established from the records of the Waterfront Employers' Hall in Seattle, that during such year he earned a total of $1,266.20. (Test. 3.) The rate of $16.23, which is contended for by complainants, was arrived at by taking two-thirds of the sum obtained by dividing $1,266.20 by 52. Testimony was further produced that Winkler had been a longshoreman for twenty-five years; that during the year before he was injured he performed no other character of work except longshoring; that for a period of ten days during that year he was disabled as the result of illness. The record will also show that during said year, except for the time he was ill, he was ready, able and willing to perform any kind of longshoring offered. (Test. 5-6-7-18.)

Further testimony was elicited concerning the longshore industry in the port of Seattle. It appears that in that particular port (and in this respect we believe the record will show that Seattle is unique in Washington) what is termed the "gang system" prevails. Certain men are members of certain fixed gangs. Other men are what are termed "extra board" men. There is a third class termed "registered casuals." In some one of the groups are classified

practically all of the regular longshoremen in this port. (Test. 26-27.) Generally speaking, the gang men earn the most wages during the year. However, some "extra board" men will earn higher. (Test. 35.)

M. Diegnan is another longshoreman, a hold man, on the extra board list, the same list upon which the defendant Winkler was registered, and his earnings amounted to $2,314.45 during the year preceding Winkler's injury, and he worked 284 days, or parts of days, (Test. 29-30) (Exhibit 3. Page 16) or an average of $8.15 per day during the days employed.

The record will also show (Test. 8-9) that longshoremen in the city of Seattle are required by the employers to hold themselves in readiness for work every day of the year with the exception of Christmas, and will also show that longshoremen are not permitted to seek other casual employment, when not employed, under pain of being compelled to give up longshoring. They are required to report daily.

It is also established that longshoring in the port of Seattle is a year-round occupation. That is to say, some ships are being loaded or discharged, and the work goes on every day of the year. Ships are coming and leaving at their own convenience, and it is to the employers interest to have, subject to call at such port, and ready to go to work at any time, day or night, a large body of men to take care of this work. A larger body of men are required to stand by

than are regularly employed, for the purpose of handling occasional peak loads, so that there may be no delay causing expense to the shippers and to the industry.

The complainants produced at the hearing, a book termed a "Study of Longshore Earnings." (Exhibit 3.) With the figures in this book, the defendant Winkler has no quarrel, and they are probably substantially correct. Much argument and many statements are included in said book, which this defendant contends cannot properly be considered as evidence. We refer to the argument with which it is interlaced, and the conclusions drawn at page 55, and we regard as utterly immaterial the statements contained at page 73 to page 82, including letters, arguments in Congress, "administrative authority," etc.

The purpose of Exhibit 3, and so-called arguments therein, is to attack the soundness of the decision of this Court in the case of *Minnie Gunther vs. United States Employees Compensation Commission*, 41 Fed. (2nd) 151.

An examination of the tables in Exhibit 3, at pages 29 to 39, will disclose that a large percentage of longshoremen in Seattle earned between periods covered by the tables, which includes the year preceding the defendant Winkler's injury, more than $1,950.00 per year. In other words, that a definite percentage (approximately 15 per cent.) worked

substantially the entire year, accepting 300 days, the number fixed by the Act, as constituting what might be termed a working year, excluding Sundays and Holidays. $1,950.00 is mentioned here because a longshoreman making such sum would be entitled to $25.00 per week under Section 910-A.

The Deputy Commissioner made the following Findings of Fact material to this inquiry, (Tr. 8-9.)

1. That the claimant defendant worked as a longshoreman 182 days, or parts of days, and therefore did not work at such employment during the whole of the year immediately preceding his injury.

2. That M. Diegnan is another workman engaged in the occupation of a longshoreman in the same port and is *of the same class as the claimant;* that during the year immediately preceding said injury the said M. Diegnan worked as a longshoreman 284 days and, therefore, worked substantially the whole of said year; that his average daily wage was $8.15 per day.

3. That as determined by subdivision (b) of Section 10 of the Act, claimant was entitled to compensation at the rate of $25.00 per week, and made an award pursuant thereto.

Action was commenced by Appellees in the District Court to enjoin payment of compensation in excess of $16.23 per week, to which bill of complaint

a motion to dismiss was filed separately upon behalf of the defendants therein. Motion to dismiss was denied and judgment was entered, enjoining the enforcement of the award in excess of $16.23 per week. The Court's opinion appears in 46 Fed. (2nd) 539. From such judgment this appeal is prosecuted.

SPECIFICATION OF ERRORS

The specification of errors (Tr. 31-32) all present substantially the same question, to-wit: was there any competent evidence to support the order of the Deputy Commissioner in fixing compensation pursuant to subdivision (b) of Section 910 of the Act. The Court erred in holding there was none. Inasmuch as all of the assignments are intended to present this question, they will be argued together.

ARGUMENT

The testimony and exhibits introduced at the hearing before the Deputy Commissioner are a part of the Bill of Complaint.

In paragraph VI of the Bill of Complaint, the allegation is made "That it appears from the evidence adduced at said hearing that claimant worked solely in the occupation of a longshoreman during substantially the whole of the year immediately preceding his injury, earning therefrom the sum of $1,266.20 (Tr. 3.) This statement is directly opposite to the Finding of Fact made by the Deputy Commissioner that the claimant worked as a longshoreman 182

days, or parts of days, and did not work at such employment during the whole of the year immediately preceding his injury. (Tr. 8.)

The Deputy Commissioner made a specific Finding of Fact that Winkler did not so work, and that is supported by the stipulation, in the record on page 2 of the transcript of testimony, and further supported by the testimony of Mr. Ringeberg (Testimony 15) and Exhibits No. 1 and No. 2 herein. This constitutes a question of fact (if under the record of this case it can be said to be a question at all.)

The Deputy Commissioner's decision upon a question of fact, if supported by competent evidence, is conclusive and will not be disturbed by the Courts. Numerous Courts have so held including this Court. A few of the authorities are:

Northwestern Stevedore Company vs. Marshall, etc. and Matheson, 41 Fed. (2nd) 28.

Pocahontas Fuel Co. vs. Monahan, 34 Fed. (2nd) 549. Affirmed 41 Fed. (2nd) 48.

Wheeling Corrugating Co. vs. McManigal, 41 Fed. (2nd) 593.

Obrecht-Lynch Corporation vs. L. D. Clark, 30 Fed. (2nd) 144.

Patrick J. Joyce vs. United States Deputy Commissioner, 33 Fed. (2nd) 218.

McCahan Sugar Refining & Molasses Company vs. Augustus P. Norton, 34 Fed. (2nd) 499.

The Deputy Commissioner further found that M. Diegnan was an employee of the same class working substantially the whole of the year involved, in the same place. (Tr. 8.) This likewise was a question of fact. That Diegnan, a "hold man" and so classified by the employers, (Exhibit 3, Page 16) and thus of the same class cannot be disputed. He was upon the same list, an "extra board" man, and engaged in doing the same general class of work. We do not understand that it has ever been contended here, that Diegnan was not a "hold man" like Winkler, engaged in doing the same kind of work. The sole distinction is that he was more frequently employed. He is not classed as a winch-driver, hatch-tender or some other higher paid class of labor. By "class," in this connection, the Act must intend to mean a man who does the same general kind of work, as distinguished from a boss or some other higher paid type of employee. At any rate he is listed by the employers themselves on the "extra board" list. It is significant that in preparing the data for Exhibit 3, for this case, the employers listed longshoremen as foremen, hatch-foremen, double winch-drivers, side runners and hold men, and otherwise distinguished the men by the character of the work and the hourly wage paid, rather than attempting to class men by the *amount* of work they had been obtaining during the period. (Exhibit 3, page 29.)

The defendant Winkler was a competent longshoreman of twenty-five years experience, ready, able and capable of doing any kind of work as a longshoreman. The Deputy Commissioner made a definite Finding upon this point as follows: "That during the year immediately preceding his injury the claimant was disabled by reason of illness for ten days, but during the remainder of said period he followed solely the employment of a longshoreman, reporting to the place of employment as frequently as required, being ready and willing to undertake and perform all work as a longshoreman offered to him." (Tr. 8.)

This Finding is supported. (Test. 5-8.) In other words we find here that the Deputy Commissioner was considering the case of a man ready, able and willing to perform any task that a longshoreman is called upon to perform and who reported for work practically every day except for a short period of disability during the year preceding his injury, and who was compelled to hold himself in readiness every day, and subject to call, and who was prevented from accepting any other casual employment.

The Act is as follows:

"Determination of Pay

Sec. 10. Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon

which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar

employment in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury."

We find that subdivision (a) refers to an employee who has worked substantially the whole of the year. Subdivision (b) refers to an employee who has not worked substantially the whole year. In the Act both subdivisions (a) and (b) refer to 300 days as indicative of what Congress had in mind as constituting substantially a working man's year, and while this figure is probably not intended to be arbitrary, something approximating 300 days of work would be considered a work year. M. Diegnan worked 284 days, or parts of days which averaged more than eight hours per day for the days that he worked. 182 days worked by the defendant, is a little more than half of 300 days. On the authority of the Gunther case the Commissioner was justified in finding that this employee did not work substantially the whole year. The Court there had under consideration a case of a man who worked less than 200 days.

If the claimant worked substantially the whole of the year immediately preceding his injury, as alleged in the complaint, his compensation should be determined according to Section 910 (a) and not 910 (c) as claimed by the complainants.

The Gunther decision is based upon the fact that the deceased workman therein did not work sub-

stantially the entire year, and specifically held that subsection (b) should be used as the basis of determining the average weekly wage of such an employee.

The argument is advanced that the Gunther decision is the result of an inadequate presentation of the facts in reference to the longshore industry, and it is broadly claimed that Section 10 (b) does not apply to the longshore industry at all. There is nothing that has been presented in this case in reference to this industry of which this appellate court was not aware of at the time the Gunther decision was decided, nor is there anything presented in this case of which Congress did not have knowledge at the time of the enactment of the Act.

The figures do not appear in the record, but by far the most important part of the act is its application to longshoremen. There are, it is true, some limited classes of employments, such as Harbor Workers, who are covered by the Act, and who may work regular hours daily, but it is a matter of common knowledge that at least 90 per cent. of the men who are subject to the provisions of this Act, are longshoremen of some type. All of this was known both to Congress at the time the law was enacted, and to this Court at the time the Gunther decision was rendered. Subsection (b) is the second provision and is intended to be ruled out only in the event it cannot be fairly applied before (c) should be considered.

While in the Gunther decision some of the testimony is discussed, and the inference drawn from such testimony that the earnings of the deceased amounted to more than $893.96, the amount established before the Deputy Commissioner, the decision is based upon the *ability of the longshoreman to earn.* As this Court said:

> "The provisions of subdivision (b) should have been applied, as, in the language of the statute, those provisions can "reasonably and fairly be applied." *At the time of his death and for a long time prior thereto decedent had been following the occupation of a stevedore or longshoreman.* Confining the evidence respecting time of employment to that considered by the Deputy Commissioner, it establishes that decedent had worked at his occupation for at least several months of the year. *In such case compensation is not based upon the amount actually received during the time employed as determined by the Deputy Commissioner,* but, as subdivision (b) provided: "His average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment—shall have earned in such employment during the days so employed." *Here apparently we have the case of a man ready, able and willing to work at his calling.* It was clearly the purpose of Congress that in case of the accidental injury or death of such an employee during the course of his employment *his ability to earn* should be the primal basis of determining compensation. Three bases for such a determina-

tion were prescribed in the statutes. If the employee had worked "substantially the whole of the year" as specified in subdivision (a), his total income was to be taken as the basis of award. *If, however, he had not been employed for substantially that length of time, then his earning power as a basis of compensation is to be determined, as provided in subdivision* (b), by taking the "average daily wage of other employees of the same class working substantially the whole of such immediately preceding year." Where the award is made under subdivision (c) actual earnings are not controlling, but the conclusion to be arrived at is a sum which "shall reasonably represent the annual earning capacity. (Italics ours.)

This is all applicable to the case at bar. Likewise we have here such a man as Gunther, "ready, able and willing to work at his calling." We have a man reporting for work daily. *We have a man required to hold himself in readiness and prohibited from accepting any other employment.* We have an industry where this man could be employed every day of the year, and we find as a *matter of fact* that he was not.

It would seem not to require authority to state that 182 days does not approximate substantially a year's work. In the Gunther case this Court has so held. It would be a strange rule that would find one-half to be a whole.

Some distinction has been attempted herein to the effect that Winkler worked substantially the entire "longshore year." This is not supported by the evi-

dence produced by the employers themselves. The facts are, and they are disclosed by this record (Ex. 3) that longshoring in the port of Seattle is a year round occupation, and the *work* goes on every day in the year. This is further evidenced by the fact that there are men of the same class as Winkler who do work substantially the entire year. This is an attempted distinction which not only does violence to the facts, but is nowise justified by the language of the Act.

In *Geroux vs. McClintic-Marshall*, 233 N. Y. S. 402, it was held 192 days was not substantially a whole year. That case turns, however, on the point that there was *no employee* working substantially the whole year.

We find here, *as a matter of fact*, that other men who do work substantially the entire year, do earn an average amount to justify this award. We find that there are any number of such men, any one of whom might have been selected upon which to base the award under subdivision (b.)

If subdivision (b) is not applicable here, it is never applicable to the longshore industry and was not a proper basis in the Gunther case. The District Court's conclusion and argument amount to a virtual over-ruling of the Gunther case.

FAIRNESS

The argument is advanced that subdivision (b)

cannot be fairly applied, because it might pay in compensation more than two-thirds of the amount that he had earned during the portion of the year worked. All of which seems to us to be a proper argument to a legislative body rather than to the Court. At any rate it is no justification for not following the plain provisions of the Act. The man had the ability to earn. The fact that he had not been employed, when M. Diegnan and others in the same class were employed, does not affect his ability.

It is contended that subdivision (b) cannot reasonably and fairly be applied to the case of an individual whose exact earnings *in the industry* are definitely established. As we conceive it, many very unfair and unreasonable situations would develop if such were the rule and if subdivision (b) be not applied. For instance, assume the case of an individual with a definite earning capacity, possibly in some other line, who should work a day, or a week, or a month, as a longshoreman and be injured before he would have any earnings in this occupation, to amount to anything. Under the contention of the Appellees, limited strictly to his own earnings in the longshore industry, he would receive practically no compensation, nor would his dependents in the event of death. Such, we believe is a situation which demonstrates the unfairness of applying any rule except as interpreted by the Deputy Commissioner. A miner or machinist, with a broken leg, received in the longshore industry, is just as much incapacitated and fairly entitled to

compensation, as the man who has worked substantially the entire year. Other examples might be cited.

Grave fears have been expressed (Exhibit 3) that it would result in malingering. In the first place this argument presupposes dishonesty. In the second place it presupposes that the dishonesty would be successful and that the injured workman would be able first to deceive the medical examiners and the Commissioner appointed to decide such matters. Numerous checks are provided in the Act against malingering, and it is not justifiable to say that a man should not be paid the compensation provided for in the Act because some might conceivably abuse the law. It might be argued in this connection, that it is better to pay an occasional malingerer, than to undercompensate an entire industry.

The practical effect of following the language of the Act as an encouragement to prolonging the period of disability is an argument which should have no standing in the Courts. It is purely a legislative consideration.

The fact that the industry demands that there remain ready, subject to call, a larger body of men than can be employed, for the purpose of taking care of the peak loads and aiding the industry, is a condition for which the industry should be charged, rather than relieved of its compensation obligations.

To construe the Act that, "*ability to earn*" means

what has *actually been earned* places it within the power of the employers to spread the work out among more men and thereby substantially reduce compensation payments. So far as the reasonableness and fairness of applying subdivision (b) I believe that Congress had in mind some such idea. We cannot believe that Congress intended to place it within the power of the employers to determine the rate of compensation they would pay.

The theory of all compensation laws and this in particular is that the industry should carry the burden of its injured workers. All are more or less arbitrary.

Wheeling Corrugating Co. vs. McManigal
41 Fed. (2nd) 593.

LANGUAGE CLEAR

The language of the Act is clear. It can mean nothing more nor less than that where a longshoreman does not work the whole year, he shall be paid at the rate that would be paid one of the same class who does work the whole year. There is nothing about the language of the provision which is involved which would seem to need judicial construction. When we bear in mind that this is an Act intended primarily to cover the longshore industry, (facts concerning which Congress is presumed to have had full knowledge) we contend that this Act should be construed according to its plain provisions as ap-

plicable to the conditions of the industry, which it was peculiarly intended to cover,—a limited field, longshoring.

In 25 *Ruling Case Law, Section* 217 (Statutes) the rule is stated and amply supported by authority.

"The intention and meaning of the legislature must primarily be determined from the language of the statute itself, but not from conjectures aliunde. When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. This principle is to be adhered to notwithstanding the fact that the Court may be convinced by extraneous circumstances that the legislature intended to enact something very different from that which it did enact. The current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. If the words of the Act are plain and the legislative purpose manifest, a contrary conception of it, however produced, cannot legitimately be permitted to create an obscurity to be cleared up by construction, influenced by the history of the legislative labors which constructed the law. No motive, purpose, or intent can be imputed to the legislature in

the enactment of a law other than such as are apparent upon the face and to be gathered from the terms of the law itself. A secret intention of the law-making body cannot be legally interpreted into a statute which is plain and unambiguous, and which does not express or imply it. Seeking hidden meanings at variance with the language used is a perilous undertaking which is quite as apt to lead to an amendment of a law by judicial construction as it is to arrive at the actual thought in the legislative mind. It has been said that where an ambiguity exists, whether because of an uncertainty as to the meaning of the words employed, or because of an apparent conflict with other statutes, or between the statute and the construction, then, and then only, are the courts permitted to look beyond the words of the particular statute to discover the legislative intent.

"The courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the legislature. They cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. If the true construction will be followed with harsh consequences, it cannot influence the courts in administering the law. The responsi-

bility for the justice or wisdom of legislation rests with the legislature, and it is the province of the courts to construe, not to make, the laws."

DISTRICT COURT OPINION

The honorable District Court in its opinion refers to that part of the Gunther decision wherein the *testimony* of the claimant is set forth and the *contention* of claimant is asserted that Gunther worked substantially the whole year. The Court did not give its assent to that proposition for by such reasoning the Court would have been compelled to decide under 10 (a) and not 10 (b.) If the rule were that the wages of the individual are the basis of his compensation rate then sub-section 10 (b) never applies and is meaningless. The word *class* becomes meaningless because every man would be in a class by himself.

There is but one conclusion to be arrived at if the reasoning of the District Court is followed and that is, there is only one basis to determine earning capacity, viz: actual earnings of the individual in the industry. In this we believe the Court is in error. Sub-section (b) is thereby eliminated from the Act as well as the very foundation of the Gunther decision. Congress surely used plain English and was not enacting a provision that did not mean what it said. There appears no justifiable reason for judicially legislating the provision out of the Act.

This subdivision has been applied before when its effect was to reduce the compensation. *Baltimore etc. S. S. Co. vs. Norton* 40 Fed. (2nd) 271.

Again, for instance, if a person only worked one week as a longshoreman and made $50.00, would it be contended his earning capacity was less than $1.00 per week and compensate accordingly? The conclusion of the Court is not in harmony with the facts nor does it necessarily follow from the language used by the Court itself in its opinion (page 543):

> "If the nature of the employment does not permit steady work during substantially the whole of the year, the annual earning capacity of the injured employee in the employment is the proper basis of compensation."

This statement assumes that a longshoreman in Seattle cannot work the whole year merely because Winkler did not.

It would appear that the keystone of the opinion of the District Court is the statement by the Court that:

> "Earning capacity means fitness and readiness and willingness to work, considered in connection with opportunity to work; and fitness and opportunity must go hand in hand." Page 545.

We disagree with the conclusions reached by the learned Judge. We contend that the record amply

justified the Deputy Commissioner's conclusion that the *opportunity* to work did exist for Winkler substantially the entire year. This again comes back to the point which we have repeatedly reiterated, that the work was there; others received it who were in the same class as this particular claimant. This is exactly what Congress contemplated by Sub-section (b.)

This distinction, we believe, runs through most of the cases cited, with the possible exception of the English decision.

Perry vs. Wright, 1 K.B. 441.

We will take up the other arguments and authorities advanced by the Court in its opinion:

New York Act and Decisions

The argument is advanced that the language of this section was taken from the language of the New York Compensation Act. No doubt it is similar to the New York Act and to other acts, but there is a wide difference between the New York Act and this one. The New York Act is a general law intended to cover more than 500 hazardous occupations, most of which are factory work, and work which is conducted on regular days of fixed hours. It cannot be said that Congress adopted the New York Act and its construction literally because some of the provisions are similar, when it is considered the different pur-

poses and fields covered by the separate acts. Hundreds of provisions of the New York Act are not a part of this Act. The New York Act was intended to cover the entire field of master and servant in hazardous occupations, while the Act of Congress was intended to cover a very limited field, almost wholly longshoremen and their employers. It, therefore, may be said that in the use of the language of the New York Act by Congress, they did not necessarily adopt a construction which was placed upon an Act having for its purpose an entirely different object and a different and wider field.

This language is not necessarily an adoption of the New York Act, as the quotation by the District Judge from the Congressional Record, 68, page 5410, discloses that Congress considered all laws on the existing subject.

We believe the distinctions above mentioned indicate a great difference in the New York Act and this Act. However, if the Acts were identical in scope and operation it does not necessarily follow that the judicial construction placed upon the language in New York was necessarily adopted and thus binding upon the United States Courts.

While it is generally held that a construction by the highest Courts of a State construing an Act adopted in another jurisdiction, is persuasive and entitled to weight, this rule is subject to many limit-

ations, which reason makes applicable here. For instance, where it is inconsistent or contrary to the spirit and policy of the law, or unsound in principle, the Courts are not fettered by it.

The Supreme Court of Iowa in *Jameson vs. Burton*, 43 Iowa 282, stated as a reason for the limitation:

> "Otherwise we could not avail ourselves of the legislative wisdom of other States, without introducing along with it incongruous and inharmonious judicial construction."

Pratt vs. Miller, 109 Mo. 78, 18 S. W. 965

Morgan vs. State, 51 Neb. 672, 71 N.W. 788

holding that construction is entitled to no greater weight than previous decisions of the adopting State, and would be rejected for reasons that would require over-ruling had it first been adopted in the latter State.

Bliss vs. Tyler, et al, 149 Mich. 601, 113 N. W. 317.

Olson vs. Wilson, 20 Mont. 544, 52 Pac. 372.

Anaconda Div. No. 1 *A. O. H. vs. Sparrow*, 29 Mont. 132, 74 Pac. 197

in which the Court stated that it would not blindly follow the construction given a particular statute by the Court of a State from which it was borrowed

when the decision does not appeal to us as founded on right reasoning.

Morgan vs. State, 51 Neb. 672, 71 N. W. 788.

State vs. Mortensen, 26 Utah 312, 73 Pac. 562.

Decisions might be multiplied upon this indefinitely.

Under this particular Act the Courts have not always followed the rules announced in New York.

Pocahontas Fuel Co. vs. Monahan, 41 Fed. (2nd) 48 (Ist Circuit)

The Act is intended primarily to cover relief to longshoremen, all of whom work as the record here discloses, under the same conditions of employment.

In many respects, as pointed out, the Act differs materially from the New York Act and the presumption does not apply.

Considering the scope of the decisions themselves, they do not have the decisiveness attributed to them.

The Honorable District Court has referred, in his opinion, to cases cited by the employer herein. The following are mentioned here because commented upon:

Littler vs. Geo. A. Fuller Co., 223 N. Y. 369, 119 N. E. 554.

Prentice vs. N. Y. State Railways, 181, App. Div. 144, 168 N. Y. S. 55.

Remo vs. Skenandoa Cotton Co., 189 App. Div. 367, 179 N. Y. S. 46.

It will be noted that not a single one of the New York cases refers to longshoring or work of the type of longshoring. This is true, although dock workers, longshoremen on land, are included in the provisions of the New York Act. *Intermittent employment* is distinguishable from *seasonal work.*

The following cases cited by the Court are distinctly seasonal occupational cases where the work as distinguished from the amount done by the individual is of a seasonal nature.

Utah Fuel Co. vs. Ind. Com. 59 Utah 46. 201 P. 1034.

Mehaffey vs. Ind. Acc. Com. 176 Cal. 711-171 Pac. 298

Andrejwski vs. Wolverine Coal Co. (Mich.) 148 N. W. 684, 182 Mich. 298

Remo vs. Skenandoa Cotton Co. 189 App. Div. 367, 179 N. Y. S. 46

Gruber vs. Kramer Amusement Co., 207 App. Div. 564, 202 N. Y. S. 413

Kapler vs. Camp Taghconic, Inc., 213 N. Y. S. 160. 215 App. Div. 51

This distinction is illustrated by what is termed the leading case in New York *Littler vs. Geo. A. Ful-*

ler Co., 223, N. Y. 369, 119 N. E. 554. In this case there was no showing that any bricklayers worked substantially the whole year and the Court stated:

> "If the nature of the employment does not permit steady work during substantially the whole of the year, the annual earning capacity of the injured employee in the employment is the proper basis of compensation."

and it is from this case and cases of a similar nature that the argument is advanced to the contrary to Appellant's position.

By seasonal occupations we believe the New York Courts had under consideration such occupations as building construction which, due to climatic reasons, or otherwise, are practically discontinued at certain periods of the year. Intermittent in a sense but not as exemplified herein. This would reflect itself directly in the *ability* of workmen in that occupation to earn in that locality. The ability of the workmen to earn as a longshoreman in Seattle, is only determined by the amount of work that he is given. The work is there, but the employers, for reasons of their own see fit to employ other persons.

In *Remo vs. Skenandoa Cotton Co.*, 189 App. Div. 367, 179 N. Y. S. 46.

the Court used similar language to that used in *Little vs. Fuller, Supra,* and the distinction would seem to

be quite as evident from the language employed, as follows, page 47:

> "If the nature of the employment does not permit steady work during substantially the whole of the year, the annual earning capacity of the injured employee in the employment is the proper basis of compensation."

This, again, was a case involving definitely seasonal employment.

In the Michigan case commented on by the Court:

> *Andrejwski vs. Wolverine Coal Co.*, 182 Mich. 298; 148 N. W. 684

it is stated:

> "It was not an employment in an *industry which continued during the entire year.* The record shows that this is not the case not only in the Saginaw Valley District, but everywhere in the coal mining industry. Again there is emphasized that the *industry* did not continue operations during the entire year."

In Michigan it is held the Act is in derogation to common law and is to be strictly construed which is not the construction accorded this Act.

> *Zurich vs. Marshall* 42 Fed. (2nd) 1010.

Also in the case cited by the Court:

> *Mehaffey vs. Ind. Acc. Comm.* 176 Cal. 711, 171 Pac. 298

the Court stated:

> "Both subdivisions 1 and 2 contemplate a kind of employment which is permanent and steady, and which for that reason affords to an employee the *possibility, at least,* of earning annually the amount measured by the number of working days in the year, estimated and fixed by the Act at 300. *Where this kind of employment is not shown to exist, the case falls within subdivision 3.*"

The provisions 1, 2 and 3, are similar to this Act, (a,) (b) and (c.) It is specifically found in the California case that no one worked in the employment during substantially the whole year.

Further observations might be made in reference to the California cases that have been mentioned as applicable to the New York Act. It is a general law and not one enacted almost solely for the purpose of and covering one specific industry.

The Utah cases, characteristic of which is

> *Utah Fuel Company vs. Ind. Comm.* 59 Utah, 46, 201 Pac. 1034,

are cases where the employment was irregular. It was clear from all of the facts in that case that not only the claimant therein, but *no one* worked in the industry more than an average of 222 days. The average number of days worked in the employer's mine was practically a permanent condition.

The statute in Utah differs materially from the

Act here. There it is merely provided that the average wage shall be the basis. The average wage is a question of fact. Where employment is *possible* during the whole year, an entirely different result is arrived at. This is illustrated by

See *Unitah Power & Light Co. vs. Ind.* Comm. 189 Pac. 875.

Again we wish to emphasize that in the industry in Seattle the possibility at least existed for Winkler to work substantially the entire year, as many others did, and that the industry was not of a seasonal nature.

The following cases which have been cited by Appellees in the lower Court, turn upon the point that there was *affirmative proof* that *no one worked* in the employment substantially the whole year, an entirely different situation than that confronting us, where there is affirmative proof that others do work in the industry the entire year.

Deverso vs. Parsons, 225 N. Y. S. 78
Geroux vs. McClintic-Marshal Co., 233 N. Y. S. 402

Mehaffey vs. Industrial Accident Commission, (Calif) 171 Pac. 298. 176 Cal. 711.

Andrejwski vs. Wolverine Coal Co. (Mich) 148 N. W. 684. 182 Mich 298.

State Road Com. vs. Ind. Comm. (Utah) 190 Pac. 544.

Utah Fuel vs. Ind. Comm. 201 Pac. 1034. 59 Utah 46.

The following cases have been cited by Appellees but they turn on the point that *there was no proof of the daily wage* of an employee of the same class working substantially the whole of the preceding year. This proof is present in this case.

McDonald vs. Burden Iron Co., 201 N. Y. S. 720

Testo vs. Burden Iron Co., 207 N. Y. S. 454

Belliamo vs. Marlin-Rockwell Corp. 213 N. Y. S. 85

Kittle vs. Town of Kinderhook 212 N. Y. S. 410

STATEMENTS IN CONGRESS

The Court commented on certain statements of members of Congress. Other statements are included in Exhibit 3, page 73, et. seq. as having some significance that the Act was adopted from New York with a ready made construction.

This evidence we believe to be immaterial as well as inconclusive. It is true that the Commissioner in an inquiry before him, is not held to technical or formal rules of evidence or procedure. Such would appear to be the intent of the Act, Section 23 (a.) Nor is the Commissioner authorized to exclude what

might be offered as testimony. However, wide discretion is given him as to the weight he may give to the so-called testimony.

Zurich Gen. Etc. vs. Marshall, 42 Fed. (2nd) 1010

We contend that there is no evidence in this record from which the Commissioner would be justified in assuming the intent of Congress with reference to this provision, except the language of the Act itself

Statements made by partisans in or out of Congress, constitute no evidence as to the intent. While it is perfectly proper to consider the history of legislation, it has been repeatedly held that debates, statements of proponents, etc., are not appropriate sources of information from which to discover the meaning of a statute.

As the Supreme Court said in:

United States vs. Trans-Missouri Freight Association, 166 U. S. 290, 41 L. ed. 1007, Page 1020,

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States vs. Union P. R. Co.* 91 U. S. 72, 79 (23:224, 228); *Aldridge vs. Williams,* 44 U. S. 3 How. 9-24 (11: 469-475), Taney, Ch. J.; *Mitchell vs. Great Works Milling & Mfg. Co.* 2 Story, 648, 653; *Reg. vs. Hartford College,* L. R. 3 Q. B. Div. 693, 707.

"The reason is that it is impossible to determine with certainty what construction was put upon an Act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative Act is from the language used in the Act, and, upon occasion, by a resort to the history of the times when it was passed."

And the rule is further stated R. C. L., Sec. 270, Page 1037 (Statutes):

"There is general acquiescence in the doctrine that the statements and opinions of legislators uttered in debates in Congress or in a state legislature are not appropriate sources of information from which to discover the meaning of the language of a statute passed by such body. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the Act itself, and the rule that the intention of the legislature is the primary consideration in the construction of a statute does not permit the Courts to consider statements made by the author of a bill or by those interested in its passage, or by members of the legislature adopting the bill, showing the meaning or effect of the language used in the bill as understood by the person or persons making such statements."

Departmental Construction

The Court in its opinion advances the argument that the compensation commission construed the Act

prior to the enactment of the Gunther decision as contended for by the employers herein. There is nothing that is entitled to be dignified as evidence to establish this in the record herein. Any construction that was placed upon the Act by the officers selected to administer it, was for a comparatively brief period, as the Act itself is new. As a matter of fact in most ports the rate of compensation has been fixed by agreement.

To the extent that a reversal of executive construction would result in depriving persons affected, of vested rights, this argument is entitled to weight. However, the application of that rule has been restricted to cases in which the meaning of the statute is really doubtful, and is applied in no case except to the extent that a different construction would disturb vested rights.

Studebaker vs. Perry, 184 U. S. 258, 46 L. ed. 528.

Deeming vs. McClaughry, 113 Fed. 639. Affirmed 186 U. S. 49, 46 L. ed. 1049.

Whittemore vs. People, 227 Ill. 453, 81 N. E. 427 (over-ruling a construction acquiesced in for forty years.)

Hord vs. State, 167 Ind. 622, 79 N. E. 916.

Comm. vs. Owensboro, etc., R. Co. 95 Ky. 60, 23 S. W. 868 (over-ruling a construction made by legislature, Governor, R. R. Comm. and Auditor.)

Ewing vs. Ainger, 97 Mich. 381, 56 N. W. 967.

People vs. Consolidated Tel. etc., 187 N. Y. 58, 79 N. E. 892.

Iselin vs. U. S. 270 U. S. 245, 70 L. ed. 566.

Departmental construction, however long, must yield to the positive language of the Act. Herein it was brief, if it can be said to have been a fixed policy.

Houghton vs. Payne, 194 U. S. 88, 48 L. ed. 888.

Legislative construction is not binding unless it has been continued in force for a long time.

Merritt vs. Cameron, 137 U. S. 542, 34 L. ed. 772.

Orchard vs. Alexander, 157 U. S. 372, 39 L. ed. 737.

U. S. vs. Johnson, 173 U. S. 363, 43 L. ed. 731.

State vs. Globe Casket Co. 82 Wash. 124, 143 Pac. 878.

The Courts are final arbiters in construction.

Cooley Constitutional Limitations, 5th ed. 69, states the rule: "That to allow force to a practical construction in such a case, would be to suffer manifest perversions to defeat the evident purpose of the lawmakers."

Certainly we fail to see where erroneous construction of an Act, by the Department, as clear in its terms as this one is, should be permitted to deprive this appellant of the compensation that the law provides that he should receive. At any rate, regardless of what the Department's construction may have been for a comparatively limited period of time, the evidence of that construction would seem to be counter-balanced by the construction now placed upon the Act as evidenced by the Commissioner's ruling in this case.

In conclusion this appellant contends that in the final analysis, the question of his average wage becomes a question of fact. That the Courts cannot be expected in every case to review the mass of testimony and decide what conclusion shall be drawn therefrom. No substantial reason exists why subsection (b) cannot be reasonably and fairly applied, and no real distinction exists between this case and the Gunther decision, which decision is logical and expresses the true intent of Congress.

This case has a greater importance to all longshoremen of the Pacific Coast as a precedent than the amount involved would seem to indicate. This is evidenced by the concentrated attack by insurance carriers upon the Commissioner's ruling and the Gunther decision.

Appellant respectfully contends the decision of the District Court is erroneous and should be reversed.

Respectfully submitted,

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